

# Open Research Online

---

The Open University's repository of research publications and other research outputs

## Towards an Intersectional Understanding of Conflict-Related Sexual Violence: Gender, Sexuality, and Ethnicity at the ICTY

### Journal Item

#### How to cite:

Isaac, Maike and Jurasz, Olga (2018). Towards an Intersectional Understanding of Conflict-Related Sexual Violence: Gender, Sexuality, and Ethnicity at the ICTY. *International Criminal Law Review*, 18(5) pp. 853–882.

For guidance on citations see [FAQs](#).

© [not recorded]



<https://creativecommons.org/licenses/by-nc-nd/4.0/>

Version: Accepted Manuscript

Link(s) to article on publisher's website:

<http://dx.doi.org/doi:10.1163/15718123-01805003>

---

Copyright and Moral Rights for the articles on this site are retained by the individual authors and/or other copyright owners. For more information on Open Research Online's data [policy](#) on reuse of materials please consult the policies page.

---

[oro.open.ac.uk](http://oro.open.ac.uk)

# Towards an Intersectional Understanding of Conflict-Related Sexual Violence: Gender, Sexuality, and Ethnicity at the ICTY

## Abstract

In the past 25 years, the International Criminal Tribunal for the former Yugoslavia (ICTY) has contributed significantly to a more sophisticated understanding of conflict-related sexual violence (CRSV) in international criminal law. The ICTY's jurisprudence has broken new ground in relation to the prosecution of CRSV, but also has brought to light the multifaceted challenges associated with the prosecution of such crimes at an international level.

Whilst cases heard by the ICTY have addressed both CRSV committed against women and men, there exist significant differences in the ways in which the ICTY has approached the experiences of male victims of sexual violence during the Yugoslav Wars. We therefore analyse the extent to and ways in which the ICTY has fostered the understanding of CRSV as *gender-based* violence that is embedded into the socio-cultural dynamics of the community within which the violence occurs.

**Keywords:** conflict-related sexual violence (CRSV); gender-based violence; socio-cultural dynamics; sexual violence against men; intersectionality; Former Yugoslavia.

## 1 Introduction

According to Saeeda Verrall, former member of the ICTY Office of the Prosecutor (OTP), the creation of a historical record of the Yugoslav Wars is not the primary

1 function of the ICTY.<sup>1</sup> However, the ICTY's case-law provides a significant record of  
2 the atrocities and extreme violence that took place in the Former Yugoslavia in 1990s.  
3  
4 Thanks to the work of the ICTY, this record is now also reflective of the mass scale of  
5 conflict-related sexual violence (CRSV) that occurred during that conflict. The ICTY's  
6  
7 closure in December 2017 invited celebrations of its legacy in advancing the prosecution  
8  
9 of sexual violence crimes in international law. At the same time, the end of ICTY's  
10  
11 operations provided a unique and timely opportunity to critically reflect on the impact of  
12  
13 the Tribunal's jurisprudence in advancing 'gender justice' in international criminal law  
14  
15 (ICL).  
16  
17  
18  
19  
20

21 Within the discipline of gender studies, Kimberlé Crenshaw's concept of  
22  
23 'intersectionality' continues to dominate the discourse even thirty years after its coining.<sup>2</sup>  
24  
25 The concept considers how different identity categories a person claims for himself or  
26  
27 herself or is assigned to, such as gender identity, sexual orientation, race, ethnicity, and  
28  
29 religious affiliation, intersect with one another and create unique experiences of harm,  
30  
31 violence, and access to justice and support services. Particularly in the context of the  
32  
33 study and reform of the criminal justice system, intersectionality aims to be more than  
34  
35 an analytical tool for the purpose of mere knowledge production. Instead,  
36  
37 intersectionality scholars and advocates aim to create an impact on social forces and  
38  
39 dynamics by not only addressing the effects of discrimination, but also its causes and  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53

---

54 <sup>1</sup> S. Verrall, 'The Picture of Sexual Violence in the Former Yugoslavia Conflicts as Reflected in ICTY  
55 Judgments' in S. Brammertz, M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*  
56 (Oxford University Press, 2016) p. 230.

57 <sup>2</sup> K. W. Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of  
58 antidiscrimination doctrine, feminist theory and antiracist politics', 1 *University of Chicago Legal Forum*  
59 (1989) Article 8.  
60  
61  
62  
63  
64  
65

underlying practices. Thus, as a critical practice, intersectionality critiques social injustices, imagines alternatives, and proposes strategies for change.<sup>3</sup>

Due to the prominence and usefulness of the concept in identifying and understanding the nuances of gender-based violence, our analysis aims to contribute to the thus far small amount of research and scholarly commentary on the incorporation of intersectionality as a practice and an analytical framework into the field of international criminal justice. As Gözde Turan put forward, if international justice is the recognition of harm, justice systems have to account for the wide spectrum of harm that is experienced during armed conflict by a great number of people based on their overlapping identities as a product of their social context.<sup>4</sup> Echoing Turan, we suggest that an intersectional analysis of international crimes, particularly those involving CRSV, is a necessary tool to fully understand and appropriately investigate, charge and prosecute conflict-related gender-based violence. Crucially, an intersectional approach towards investigating and prosecuting crimes committed during armed conflict would allow for the disruption of traditional gender conceptions relating to CRSV. Furthermore, such an approach would enable the courts to produce a more nuanced understanding of CRSV and challenge the assumption of homogeneity of CRSV victims which is commonly reproduced in judgments of international criminal courts and tribunals.<sup>5</sup> Particularly in light of the symbolic nature of international courts and tribunals and the historic documentation of armed conflicts they create,<sup>6</sup> ICL has an opportunity of establishing a historical record

---

<sup>3</sup> *Ibid.*, p. 149; See also C. A. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence', 8(4) *Signs: Journal of Women in Culture and Society* (1983); P. H. Collins, 'Intersectionality's definitional dilemmas', 41 *Annual Review of Sociology* (2015) p. 17; G. Turan, 'Manhood Deprived and (Re)constructed during Conflicts and International Prosecutions: The Curious Case of the Prosecutor v. Uhuru Muigai Kenyatta et al.', 24(1) *Feminist Legal Studies* (2016), p. 34.

<sup>4</sup> Turan, *supra* note 3, p. 34.

<sup>5</sup> *Ibid.*, p. 44.

<sup>6</sup> D. Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law', 11 *International Criminal Law Review* (2011) p. 413.

1 that is reflective of the experiences of all people impacted by the conflict. This ‘produced  
2 truth’ has to link the crimes committed to their causes in order to create a foundation for  
3 future conflict prevention.<sup>7</sup> For this purpose, an intersectional analysis and investigation  
4 of the crimes committed during armed conflict is imperative.  
5  
6

7  
8  
9 In the following sections of this article, we analyse the legacy of the ICTY in relation to  
10 the prosecution of CRSV through an intersectional lens. We start our analysis with a  
11 discussion of the landmarks established by the ICTY jurisprudence on CRSV. As part of  
12 this discussion we provide a commentary on the successful prosecutions of substantive  
13 crimes and the advancement of the jurisprudence on modes of liability for CRSV through  
14 the category of joint criminal enterprise III (JCE III). Secondly, we move to explore the  
15 ways in which the ICTY’s jurisprudence on CRSV could have been expanded to create  
16 a more gender-based understanding of CRSV that took place during the Yugoslav  
17 conflict. We focus on two aspects of the ICTY’s jurisprudence: firstly, we examine the  
18 way in which cases involving sexual violence against men have been prosecuted and we  
19 interrogate the gender aspect of these decisions; secondly, we turn to the question of  
20 intersectionality in the CRSV judgments of the ICTY and consider whether the existing  
21 jurisprudence reflects the multidimensional and diverse nature of harms sustained by the  
22 victims of sexual violence in the former Yugoslavia.  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42

43 Recognizing the multiple challenges faced by the ICTY as well as the practical and  
44 procedural limitations of any international judicial investigative body, it cannot be  
45 emphasised enough that, especially in the context of the prosecution of CRSV, the ICTY  
46 has made significant progress and paved the way for international judicial bodies that  
47 followed. To further advance international criminal justice, the legacy of the tribunal  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58

---

59 <sup>7</sup> On the term ‘produced truth’ see D. Buss, ‘Knowing Women: Translating Patriarchy in International  
60 Criminal Law?’, 23(1) *Social & Legal Studies* (2014) p. 73.  
61  
62  
63  
64  
65

1 shall - in the framework of our analysis - not only constitute all of the ICTY's  
2 accomplishments, but also all the challenges that persist after over twenty years of  
3 prosecuting CRSV in ICL. Thus, where we point to gaps and shortcomings, it is with the  
4 intention of providing insight into the ways in which the prosecution of CRSV in  
5 international criminal law can be improved by incorporating more consistently an  
6 intersectional inquiry into the causes and effects of CRSV.  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

## 17 **2 Conflict-Related Sexual Violence: Socio-Cultural and Intersectional** 18 19 **Perspectives** 20 21 22 23

24 At the time when the ICTY was created in 1993, relatively little had been written about  
25 CRSV. Although the international humanitarian law framework prohibiting sexual  
26 violence was created in 1949 (Geneva Conventions) and 1977 (Additional Protocols to  
27 the four Geneva Conventions), perceptions and treatment of CRSV in the early 1990s  
28 were still susceptible to myths regarding its nature, purpose and patterns of occurrence  
29 in armed conflicts. Whilst sexual abuse of women (as well as men) had been well  
30 documented, CRSV was viewed by many as a seemingly inseparable and omnipresent  
31 element of armed conflicts or even as “socially acceptable behaviour well within the  
32 rules of warfare”.<sup>8</sup> However, the outbreak of the war in the Former Yugoslavia (and soon  
33 thereafter, the Rwandan Genocide) demonstrated a mass scale of sexual violence in  
34 modern armed conflicts (or, following Mary Kaldor, ‘new wars’)<sup>9</sup> and exposed the  
35 multiple contexts in which CRSV takes place. Furthermore, as the scholarship on CRSV  
36 has been expanding since early 1990s, some progress was made towards a deeper and  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57

---

58 <sup>8</sup> K. D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus  
59 Nijhoff Publishers, Leiden, 1997) p. 21.

60 <sup>9</sup> M. Kaldor, *New and Old Wars* (Polity Press, Cambridge, 2012).  
61  
62  
63  
64  
65

1 more nuanced understanding of CRSV, its causes and uses. This was made possible not  
2 only thanks to feminist scholars and civil society organisations who relentlessly  
3 advocated for greater accountability for CRSV, but also through the work of international  
4 criminal tribunals, particularly the ICTY, that established long-overdue accountability  
5 for rape and other forms of sexual violence in international law. Furthermore, a  
6 heightened visibility of CRSV in cases before ad hoc tribunals has opened up avenues  
7 for further interrogation of the phenomenon of CRSV, its role in new wars, as well as the  
8 impact it has on victims, especially from an intersectional perspective.  
9

10 It is now generally acknowledged that CRSV, in particular rape, constitutes a deliberate  
11 strategy of war which, through relying on very particular sociological, cultural and  
12 psychological aspects of the outcome of the act, purports to attack and weaken the  
13 targeted community. It is understood that CRSV often serves other military purposes,  
14 such as ethnic cleansing or even genocide. As emphasised in the United Nations Security  
15 Council Resolution (UNSCR) 1820, sexual violence is a tool of war, contributing to the  
16 international destabilization, humiliation, and degradation of a population or an ethnic  
17 group.<sup>10</sup>  
18

19 Sexual violence continues to be used in new wars which are predominantly waged in the  
20 name of ethnic, religious or tribal identity and belonging. Furthermore, as Chinkin and  
21 Kaldor attest, new wars are characterised by high levels of extreme violence towards  
22 civilians which is used to instill fear in order to exercise control and to ‘expel or kill those  
23 who disagree or have a different identity’.<sup>11</sup> This too was the key characteristic of the  
24 conflict in the former Yugoslavia. However, the conflict also had a significant gender  
25 dimension, evidenced not least in the systematic pattern of the use of sexual violence  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57

---

58 <sup>10</sup> United Nations Security Council, *Resolution 1820* (UN Doc. S/RES/1820), Preamble.

59 <sup>11</sup> C. Chinkin, and M. Kaldor, ‘Gender and New Wars’ 67(1) *Journal of International Affairs* (2013), pp.  
60 167, 173.  
61  
62  
63  
64  
65

1 against members of particular ethnic and religious groups in an attempt to spread terror,  
2 displace, persecute, but also to ethically cleanse certain territories. Bosnian Muslim  
3 women in particular were targeted due to both their gender and ethnicity. Although  
4 sexual violence had been used as a tactic in many wars prior to the Yugoslav conflict,  
5 Slavenka Drakulić observed that ‘(w)hat seems to be unprecedented about the rapes of  
6 Muslim women in Bosnia (and, to a lesser extent, Croatian women too) is that there is a  
7 clear political purpose behind the practice. The rapes in Bosnia are not only a standard  
8 tactic of war, they are an organised and systematic attempt to cleanse (to move, resettle,  
9 exile) the Muslim population from certain territories’.<sup>12</sup>  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

24 As illustrated by modern armed conflicts, the way in which CRSV occurs across conflicts  
25 is not uniform. It manifests itself through various patterns, occurs in many different  
26 contexts, and is committed by a multitude of perpetrators. Furthermore, as demonstrated  
27 by Wood, the variation in the use of sexual violence depends on the culture and  
28 organisation within individual armed groups which in turn influences the ‘repertoire of  
29 violence’ of the particular group.<sup>13</sup> During the conflicts in Rwanda and in the Former  
30 Yugoslavia, sexual violence was an integral part of genocide whereby women of  
31 particular ethnicity (Tutsi/ Bosnian Muslim women) were targeted, raped and,  
32 particularly in the Rwandan context, killed. Both conflicts exposed the intersectional  
33 nature of CRSV, particularly in relation to ethnicity, as women were targeted both due  
34 to their gender and their ethnicity.<sup>14</sup> The conflict in the former Yugoslavia also exposed  
35 other characteristics and multiple contexts of CRSV, including the diversity of  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54

---

55 <sup>12</sup> S. Drakulić, ‘Women Hide Behind a Wall of Silence: Mass Rape in Bosnia’, 1 March 1993, 8 *The*  
56 *Nation*, pp. 267-268.

57 <sup>13</sup> E. J. Wood, ‘Conflict-related sexual violence and the policy implications of recent research’ 96 (894)  
58 *International Review of the Red Cross* (2014), pp. 457, 461, 466-470.

59 <sup>14</sup> See D. Buss, ‘The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal  
60 Law’ 25(1) *Windsor Yearbook of Access to Justice* (2007), p. 3.  
61  
62  
63  
64  
65



1 perpetrators of CRSV, who can be state actors, military or non-state actors such as gangs  
2 and rebel groups as well as peacekeeping forces. The public nature of sexual violence  
3 committed during the Yugoslav conflict has also come to light in the CRSV cases heard  
4 before the ICTY. In that context, women were frequently raped by soldiers, policemen  
5 and other state agents, many of whom were known to the victims from before the war.  
6  
7 Furthermore, the use of rape camps (such as those in the Bosnian town of Foča) and the  
8 widespread perpetration of sexual violence on forcibly detained women emphasised the  
9 role of CRSV in the context of detention and enslavement.<sup>15</sup> The latter was later  
10 prosecuted in the landmark judgment in *Kunarac*, which advanced the modern  
11 understanding of enslavement as well as the role of sexual violence in perpetration of  
12 this crime. Crucially, the Trial Chamber in *Kunarac* placed the notion of the exercise of  
13 powers attaching to the rights of ownership over another person at the centre of defining  
14 enslavement. Furthermore, as the case dealt exclusively with charges of sexual violence,  
15 the Trial Chamber broadened the acts that constitute enslavement as a crime against  
16 humanity to include sexual enslavement. In doing so, the Trial Chamber made the link  
17 between crimes involving sexual violence and customary international law, emphasising  
18 that sexual servitude of women in Foča constituted enslavement.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42

43 The significance of gender as a factor shaping the reality of new wars as well as the  
44 strategic use of CRSV are further illustrated by the impact that CRSV has on the victims,  
45 both male and female. The consequences of CRSV do not only span across time (short-  
46 mid- and long- term) but also affect various aspects of the victim's life, including  
47  
48  
49  
50  
51  
52  
53  
54  
55

---

56 <sup>15</sup> *Prosecutor v. Mucić et al. (Čelebići Case)*, Judgment of 16 November 1998, IT-96-21-T,  
57 <[www.icty.org/case/mucic/4#tjug](http://www.icty.org/case/mucic/4#tjug)> accessed 19 April 2018; *Prosecutor v. Kvočka et al.*, Judgment of 2  
58 November 2001, IT-98-30/1-T <[www.icty.org/case/kvocka/4](http://www.icty.org/case/kvocka/4)> accessed 19 April 2018; *Prosecutor v.*  
59 *Kunarac*, Appeals Chamber Judgment of 12 June 2002, IT-96-23/IT-96-23/1-A,  
60 <[www.icty.org/case/kunarac/4#acjug](http://www.icty.org/case/kunarac/4#acjug)> accessed 19 April 2018.  
61  
62  
63  
64  
65

1 physical, mental, economic, social as well as cultural implications. Whilst such  
2 consequences concern both male and female victims, the particularly detrimental and  
3 gender-specific position of women and girls in armed conflict was recognized at the  
4 international level during The Fourth World Conference on Women in 1995, where it  
5 was noted that ‘while entire communities suffer the consequences of armed conflict and  
6 terrorism, women and girls are particularly affected because of their status in society and  
7 their sex’.<sup>16</sup> Women’s experiences of armed conflict are underscored by their gender  
8 roles within a particular social context, but they are by far not uniform. Whilst there exist  
9 some common aspects, women’s actual experiences depend on a range of factors, such  
10 as age, race, class, nationality, employment, socio-economic status and, finally, their  
11 combatant or civilian status.<sup>17</sup> During conflict, women’s traditional gender roles (for  
12 example as wives, mothers and carers) become especially important from a social and  
13 political perspective and gain strategic significance. They are not only seen as paramount  
14 to ensuring the survival of a particular social, ethnic or religious group, but also in  
15 securing the maintenance and continuity of their traditions and customs. However, that  
16 also means that targeting women, often by acts of sexual violence, becomes a politically  
17 and strategically important aspect of ethnic conflicts, as illustrated by the conflicts in  
18 Rwanda and in the former Yugoslavia.

19 In contrast, men are stereotyped as able to protect themselves from an attack and are not,  
20 unlike women, thought of as targets of sexual abuse. When a man has been sexually  
21 assaulted during armed conflict, his masculinity is often questioned (by himself and/or  
22 others) because he was not able to protect himself like a *real* man and instead put into  
23 the stereotypically submissive role of a woman. Just as in the case of female victims of

---

24 <sup>16</sup> United Nations, *Report of the Fourth World Conference on Women*, (UN Doc. A/CONF. 177/20),  
25 para.135.

26 <sup>17</sup> C. Chinkin, ‘Gender and Armed Conflict’ in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of*  
27 *International Law in Armed Conflict* (Oxford University Press, Oxford, 2014), pp. 677-678.

1 CRSV, a man's experience of CRSV is also largely informed by his identities, how his  
2 community interacts with these identities, and what expectations exist towards him as a  
3 man. In most conflict environments, men are subjected to sexual acts performed by other  
4 men. Those other men are either unarmed victims (non-combatants or prisoners) of the  
5 same act, or combatants who are ordered by their superior to sexually violate unarmed  
6 detainees or civilians. Depending on the command structure and given or perceived  
7 agency of the individual combatant to reject orders, the lines between victimhood and  
8 perpetration can become blurred. In many cases the male-to-male rape is not only an  
9 attack on the gender role of the male victim within society, but also an attack on his  
10 sexuality. Particularly where masculinity is closely associated with heterosexuality,  
11 male-to-male rape exposes male victims to further stigmatization and societal isolation,  
12 especially when same sex intimacy is ostracized or even illegal.<sup>18</sup>

13 In the context of the Yugoslav Wars, in a society where homosexuality was a taboo at  
14 the time, the perceived sexuality of male victims of rape likely played a significant role.<sup>19</sup>

15 Pierre Salignon, who worked for Médecins Sans Frontières with refugees in Croatia,  
16 explained that the sexual abusers of men were intelligent torturers, because they chose a  
17 means of inflicting violence upon their victims that would not kill them but break them  
18 through an extreme form of degradation.<sup>20</sup> Also, OSCE staff found strong indicators in  
19 the Yugoslav Wars that sexual violence against men was used to break down the

---

20 D. A. Lewis, 'Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under  
International Law', 27(1) *Wisconsin International Law Journal* (2009) p. 8; P. Oosterhoff, P. Zwanikken  
and E. Ketting, 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret', 12(23)  
*Reproductive Health Matters* (2004) p. 68; S. Sivakumaran, 'Male/Male Rape and the "Taint" of  
Homosexuality', 27(4) *Human Rights Quarterly* (2005) p. 1290.

<sup>19</sup> Sivakumaran, *supra* note 18, p. 1299.

<sup>20</sup> J. Borneman, *Subversions of International Order. Studies in the Political Anthropology of Culture* (State  
University of New York Press, Albany, 1998) p. 292.

1 physical, psychological and sexual identity of victims.<sup>21</sup> In fact, interviews with Bosnian  
2 Muslim male victims of sexual violence revealed that rape was the most difficult trauma  
3 to deal with because they associated the experience of rape by male with  
4 homosexuality.<sup>22</sup> In the case of both female and male victims of CRSV, the effect of  
5 sexual violence as a means to psychologically break the victim is facilitated and  
6 reinforced through the same tropes and societal expectations relating to masculinity,  
7 femininity, and sexuality.  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

### 22 **3 ICTY's Legacy in Prosecuting CRSV**

23 When assessing the ICTY's legacy in relation to establishing accountability for CRSV,  
24 it is worth emphasising the context in which the ICTY achieved its landmark  
25 jurisprudence. Whilst it is now relatively common to prosecute CRSV at an international  
26 level, at the time of the ICTY's inception there were no precedents of such judicial  
27 practice. For instance, neither the International Military Tribunal at Nuremberg or at  
28 Tokyo entered convictions for crimes involving sexual violence perpetrated during  
29 World War II. The indictments for sexual violence perpetrated in Bosnia and  
30 Herzegovina were filed in the early days of the ICTY's operations against the backdrop  
31 of this 'historical legacy' of gross invisibility of sexual violence in ICL. The practical  
32 implications of this meant that whilst it was possible to charge rape as a crime against  
33 humanity under Article 5(g) of the ICTY Statute, charging other forms of sexual violence  
34 appeared to be less straight forward. There was a lack of substantive provisions  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55

---

56 <sup>21</sup> OSCE, *Kosovo/Kosova. As seen, as told. An analysis of the human rights findings of the OSCE Kosovo*  
57 *Verification Mission from October 1998 to June 1999*, <[www.osce.org/odihr/17772?download=true](http://www.osce.org/odihr/17772?download=true)>  
58 accessed 19 April 2018, p. 95.

59 <sup>22</sup> M. B. Olujić, 'Embodiment of Terror: Gendered Violence in Peacetime and Wartime in Croatia and  
60 Bosnia-Herzegovina', 12(1) *Medical Anthropology Quarterly* (1998) p. 33.  
61  
62  
63  
64  
65

concerning such crimes in the ICTY Statute (e.g. forced pregnancy, sexual slavery) as well as a notable absence of appropriate definitions of such offences in ICL.

### 3.1 *Changing Perceptions of CRSV*

Despite these significant obstacles, the ICTY achieved what appeared impossible to many: it brought accountability for CRSV to the realm of international law and substantively developed the law in respect of international crimes involving sexual violence. Although some questioned the legality and legitimacy of the ICTY, its jurisprudence set major milestones by holding perpetrators of international crimes criminally accountable and also by developing a comprehensive conceptual and procedural framework of ICL.<sup>23</sup> Much has been written about the landmarks set by the ICTY in individual cases, highlighting prosecutions of rape as torture (*Mucić et al.*), sexual enslavement and rape as crimes against humanity (*Kunarac*), first successful prosecution of sexual violence against men (*Tadić*) or recognition that acts of sexual nature may amount to persecution (*Brđanin*).<sup>24</sup> The Appeals Chamber judgment in *Kunarac* was particularly progressive not only in advancing the concept of coercive circumstances as a basis for negating the possibility of ‘true consent’ in cases involving sexual violence<sup>25</sup> but also determined the relationship of gender crimes (particularly CRSV) to customary law. Furthermore, the ICTY case-law subverted many traditional

---

<sup>23</sup> The legality and legitimacy of the ICTY were contested by the defendant in *Prosecutor v. Tadić*. However, these arguments were dismissed by the ICTY Appeals Chamber in its decision on jurisdiction, see *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, IT-94-I <[www.icty.org/x/cases/tadic/acdec/en/51002.htm](http://www.icty.org/x/cases/tadic/acdec/en/51002.htm)> accessed 19 April 2018.

<sup>24</sup> D. Buss, ‘Prosecuting Mass Rape: Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic’, 10(1) *Feminist Legal Studies* (2000) p. 90; A. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence. The ICC and the Practice of the ICTY and the ICTR* (Intersentia, Cambridge, 2005); A. de Brouwer, C. Ku, R. Römken and L. van den Herik, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge, 2013); S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016).

<sup>25</sup> *Prosecutor v. Kunarac*, Appeals Chamber Judgment of 12 June 2002, IT-96-23/IT-96-23/1-A, <[www.icty.org/case/kunarac/4#acjug](http://www.icty.org/case/kunarac/4#acjug)> accessed 19 April 2018, para. 129-132.

1 misconceptions about CRSV, especially that it is an incidental by-product of conflict, by  
2 demonstrating that sexual violence was occurring in multiple contexts (detention,  
3 interrogation, ethnic cleansing campaigns) and committed by multiple perpetrators.<sup>26</sup>  
4  
5 The Tribunal established that CRSV is used for strategic purposes and, as such,  
6  
7 successfully connected acts of sexual violence to relevant modes of liability, including  
8  
9 individual and superior criminal responsibility. In 2014, the ICTY Appeals Chamber  
10  
11 made a groundbreaking statement by confirming that crimes involving CRSV are on a  
12  
13 par with other (non-sexual) crimes within the jurisdiction of the Tribunal. Importantly,  
14  
15 the Appeals Chamber emphasized:  
16  
17  
18  
19  
20  
21  
22  
23

24 (... ) that personal motive does not preclude a perpetrator from also having the  
25  
26 requisite specific intent. (...) the same applies to sexual crimes, which in this  
27  
28 regard must not be treated differently from other violent acts simply because of  
29  
30 their sexual component. Thus, a perpetrator may be motivated by sexual desire  
31  
32 but at the same time also possess the intent to discriminate against his or her  
33  
34 victim on political, racial, or religious grounds.<sup>27</sup>  
35  
36  
37

38 Through its extensive jurisprudence, the ICTY demonstrated that punishing CRSV is  
39  
40 dependent not only on substantive provisions criminalising acts of sexual nature. More  
41  
42 crucially, it requires the appropriate characterisation and contextualisation of CRSV as  
43  
44 well as linking the alleged acts to the accused through the appropriate mode of liability.  
45  
46 Reflecting on the ICTY OTP's experience Baig et al. note that cases involving (often  
47  
48  
49  
50  
51  
52  
53

---

54 <sup>26</sup> For instance, the Trial Chamber in *Prosecutor v. Karadžić et al.* confirmed that 'the systematic rape of  
55 women... is in some cases intended to transmit a new ethnic identity to the child': *Prosecutor v. Karadžić*  
56 *et al.*, Transcript of Hearing from 2 July 1996, IT-95-18-R61, IT-95-5-R61,  
57 <[www.icty.org/x/cases/karadzic/trans/en/960702it.htm](http://www.icty.org/x/cases/karadzic/trans/en/960702it.htm)> accessed 19 April 1988, para. 94.

58 <sup>27</sup> *Prosecutor v. Dordević*, Appeals Chamber Judgment of 27 January 2014, IT-05-87/1-A  
59 <[www.icty.org/case/djordjevic/4](http://www.icty.org/case/djordjevic/4)> accessed 19 April 2018, para. 887.  
60  
61  
62  
63  
64  
65

low-level) direct physical perpetrators of CRSV were least complicated to prosecute.<sup>28</sup> Such cases were also most successful and showed a minimal need for contextualisation of the crime. In contrast, prosecuting CRSV is much more difficult when acts require linking to mid- and senior-level figures. Thus, the ICTY's record in successfully utilising the doctrine of JCE in cases involving CRSV is a significant part of its legacy.

### 3.2 *JCE III and Prosecution of CRSV*

In order to charge and prosecute high-level commanders and leaders for gender-based crimes, the link needs to be established between the acts of sexual violence and the accused. It needs to be shown that the accused either committed or instigated the acts themselves (individual criminal responsibility) or that the accused exercised superior responsibility over the direct perpetrator of the alleged offence (superior responsibility doctrine). In the context of the latter, it needs to be demonstrated that the perpetrator (i.e. subordinate) was under the effective control of the accused and that the accused knew, or should have known, that his subordinates were committing or were about to commit international crimes yet failed to take all necessary and reasonable measures to prevent or repress the commission of such crimes.

JCE can be used in relation to any of the crimes under the ICTY Statute, and there is no reason to treat it any differently in cases involving sexual violence. In order to prosecute any crime using JCE liability, it needs to be shown that there exists a link between the high-level accused person and the committed crimes, even though the accused may have

---

<sup>28</sup> L. Baig, M. Jarvis, E. Martin Salgado and G. Pinzauti, 'Contextualizing Sexual Violence: Selection of Crimes' in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016) p. 174.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65

been physically removed from them. The ICTY Appeals Chamber in *Tadić* confirmed that JCE is a part of customary ICL and outlined three forms of JCE:

- a) JCE I, where all participants in the common design possess the same criminal intent to commit a crime;
- b) JCE II (so called ‘concentration camp’ cases) is a variant of JCE I which requires that a criminal plan involves ill-treatment taking place in an institutionalised setting, e.g. detention camp;
- c) JCE III, where the criminal act falls outside the ‘common purpose’ but is nonetheless a foreseeable consequence of the common plan’s implementation.<sup>29</sup>

The ICTY has successfully relied on JCE in the prosecution of cases involving sexual violence.<sup>30</sup> The mode of liability applied in such cases was generally involving JCE III (i.e. where sexual violence was a natural and foreseeable consequence of the implementation of the common plan), but JCE I liability was nonetheless successfully invoked in *Stakić*.<sup>31</sup> In *Prosecutor v. Kvočka et al.*, the ICTY Trial Chamber convicted the accused of committing acts of persecution (involving rape and sexual assault) in the

---

<sup>29</sup> *Prosecutor v. Tadić*, Appeals Chamber Judgment of 15 July 1999, IT-94-1-A, <[www.icty.org/cases/party/787/4](http://www.icty.org/cases/party/787/4)> accessed 19 April 2018, para.220.

<sup>30</sup> For example: *Prosecutor v. Kvočka et al.*, Trial Judgment of 2 November 2001, IT-98-30/1 <[www.icty.org/case/kvocka/4](http://www.icty.org/case/kvocka/4)> accessed 19 April 2018; *Prosecutor v. Krstić*, Appeals Judgment of 19 April 2004, IT-98-33-A <[www.icty.org/case/krstic/4](http://www.icty.org/case/krstic/4)> accessed 19 April 2018; *Prosecutor v. Šainović et al.*, Appeals Judgment of 23 January 2014, IT-05-87-A <[www.icty.org/case/milutinovic/4](http://www.icty.org/case/milutinovic/4)> accessed 19 April 2018.

M. Jarvis, E. M. Salgado, ‘Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice’ in A. de Brouwer, C. Ku, R. Römken and L. van den Herik, *supra* note 24, pp. 111-117.

<sup>31</sup> *Prosecutor v. Stakić*, Trial Judgment of 31 July 2003, IT-97-24-T <[www.icty.org/cases/party/782/4](http://www.icty.org/cases/party/782/4)> accessed 19 April 2018, paras. 234-236, 240-241, 244, 757, 791-806, 826; *Prosecutor v. Stakić*, Appeal Judgment of 22 March 2006, IT-97-24-A, <[www.icty.org/cases/party/782/4](http://www.icty.org/cases/party/782/4)> accessed 19 April 2018, paras.73, 84-85, 92-98, 104; The ICTY Trial Chamber also used JCE I in *Prosecutor v. Krajišnik*, convicting Krajišnik of persecution based on, amongst other things, sexual violence. However, the ICTY Appeals Chamber overturned Trial Chamber’s finding due to insufficient detail. Therefore, the final decision in *Krajišnik* did not include sexual violence crimes. *Prosecutor v. Krajišnik* Trial Judgment of 27 September 2006, IT-00-39-T <[www.icty.org/cases/party/709/4](http://www.icty.org/cases/party/709/4)> accessed 19 April 2018, paras. 4, 1126, 1145, 1182.



1 Omarska camp in Prijedor. Considering the question of foreseeability of acts of sexual  
2 violence in the detention camp in Omarska by the defendants, the Trial Chamber  
3 concluded that in light of the circumstances and conditions imposed upon detainees in  
4 the Omarska camp, it was foreseeable that acts of sexual violence might be committed  
5 (even though they did not form a part of the common plan agreed by the accused):  
6  
7  
8  
9  
10  
11  
12  
13

14 Any crimes that were natural or foreseeable consequences of the joint criminal  
15 enterprise of the Omarska camp, including sexual violence, can be attributable to  
16 participants in the criminal enterprise if committed during the time he participated  
17 in the enterprise. In Omarska camp, approximately 36 women were held in  
18 detention, guarded by men with weapons who were often drunk, violent, and  
19 physically and mentally abusive and who were allowed to act with virtual  
20 impunity. Indeed, it would be unrealistic and contrary to all rational logic to  
21 expect that none of the women held in Omarska, placed in circumstances  
22 rendering them especially vulnerable, would be subjected to rape or other forms  
23 of sexual violence.<sup>32</sup>  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34

35 Similarly, in *Krstić*, the ICTY Trial Chamber reasoned that sexual violence was not an  
36 agreed part of the defendants' common purpose to forcibly transfer Bosnian Muslims  
37 from Srebrenica, but rather amounted to a natural and foreseeable consequence of such  
38 plan. The ICTY correctly noted that factors such as 'the lack of shelter, the density of the  
39 crowds, the vulnerable condition of the refugees, the presence of many regular and  
40 irregular military and paramilitary units in the area and the sheer lack of sufficient  
41 members of the UN to provide protection' were indicative of the foreseeability of sexual  
42 violence.<sup>33</sup>  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55

56 <sup>32</sup> *Prosecutor v. Kvočka et al.*, Trial Judgment of 2 November 2003, IT-98-30/1-T,  
57 <[www.icty.org/cases/party/721/4](http://www.icty.org/cases/party/721/4)> accessed 19 April 2018, para. 327.

58 <sup>33</sup> *Prosecutor v. Krstić*, Trial Judgment of 2 August 2001, IT-98-33-T <[www.icty.org/case/krstic/4](http://www.icty.org/case/krstic/4)>  
59 accessed 19 April 2018, para.616; conviction of Krstić in relation to acts of sexual violence on the basis  
60  
61  
62  
63  
64  
65

1  
2 In *Šainović et al.*, the ICTY Appeals Chamber reversed the first instance finding that  
3  
4 while acts of murder and destruction or damage to religious property were sufficiently  
5  
6 foreseeable consequences of the ethnic cleansing campaign in Kosovo in 1999, sexual  
7  
8 assaults were not (amounting to a JCE).<sup>34</sup> The Appeals Chamber, similarly to *Krstić* and  
9  
10 *Kvočka*, relied on various facts (such as reports of sexual violence taking place) as well  
11  
12 as circumstantial factors suggesting that it was foreseeable to the accused that sexual  
13  
14 violence might be committed in relation to Kosovar Albanian women. In addition, the  
15  
16 Appeals Chamber provided an important clarification on the standard for JCE III  
17  
18 liability, confirming that it is one of possibility, not probability. Therefore, it corrected  
19  
20 the error of the Trial Chamber in applying the higher degree of foreseeability than  
21  
22 required for crimes falling outside the scope of common purpose (i.e. JCE III).<sup>35</sup>  
23  
24  
25  
26  
27  
28  
29  
30  
31

#### 32 **4 Broadening the Understanding of Gender-Based Violence to Include the** 33 34 **Experiences of Men**

35  
36  
37  
38  
39 Despite significant advances in international criminal prosecutions of CRSV, it has in  
40  
41 many contexts been treated as a ‘women’s issue’.<sup>36</sup> It is widely recognized that women  
42  
43  
44  
45

---

46 of JCE III was upheld on appeal: *Prosecutor v. Krstić*, Appeals Judgment of 19 April 2004, IT-98-33-A  
47 <[www.icty.org/case/krstic/4](http://www.icty.org/case/krstic/4)> accessed 19 April 2018, paras. 150-151.

48 <sup>34</sup> *Prosecutor v. Milutinović et al.*, Trial Judgment of 26 February 2009, vol.III, IT-05-87-T  
49 <[www.icty.org/case/milutinovic/4](http://www.icty.org/case/milutinovic/4)> accessed 19 April 2018, paras. 470-473 (finding, in respect of  
50 Šainović, that murder and destruction of damage to religious property was reasonably foreseeable but that  
51 sexual assault was not), paras.1134-1136 (finding, in respect of Lukić, that murder and destruction of  
52 damage to religious property was reasonably foreseeable but that sexual assault was not); overturned on  
53 appeal: *Prosecutor v. Šainović et al.*, Appeals Judgment of 23 January 2014, IT-05-87-A  
54 <[www.icty.org/case/milutinovic/4](http://www.icty.org/case/milutinovic/4)> accessed 19 April 2018, paras.1581-1582 (re: Šainović), 1591-1592  
55 (re: Lukić).

56 <sup>35</sup> *Prosecutor v. Šainović et al.*, Appeals Judgment of 23 January 2014, IT-05-87-A  
57 <[www.icty.org/case/milutinovic/4](http://www.icty.org/case/milutinovic/4)> accessed 19 April 2018, para.1061.

58 <sup>36</sup> A. Kapur and K. Muddell, ‘When No One Calls It Rape. Addressing Sexual Violence Against Men and  
59 Boys in Transitional Contexts’ International Center for Transitional Justice, 12 July 2016,  
60 <[www.ictj.org/publication/sexual-violence-men-boys](http://www.ictj.org/publication/sexual-violence-men-boys)> accessed 19 April 2018.  
61  
62  
63  
64  
65

1 and girls have been disproportionately affected by any form of sexual violence in many  
2 if not most of the armed conflicts of the twentieth and twenty-first century. Sexual  
3 violence against men has also been documented in recent and ancient armed conflicts.  
4 While far fewer men than women and girls become victims of sexual violence, sexual  
5 violence against all members of society, independent of their sex or gender identity, has  
6 to be understood in the context of dominating narratives relating gender, sex, and  
7 sexuality. All forms of sexual violence therefore have to be discussed in conjunction with  
8 and not in separation of each other.<sup>37</sup>

9 Owing to feminist activism and scholarship in the outgoing twentieth century, CRSV  
10 against women is today acknowledged as more than a ‘meaningless explosion of inner  
11 rage’.<sup>38</sup> Instead, it is seen as an expression of power of one conflict party over another  
12 that targets gender roles and dynamics.<sup>39</sup> To this end, CRSV is often correctly referred  
13 to as *gender-based violence*. The conflated use of the terms *gender-based violence* and  
14 *violence against women* is, however, problematic as it is indicative of a misconception  
15 about the extent to which gender-based violence occurs during armed conflict, whom it  
16 targets, how, and for what reason. Gender roles and societal expectations about  
17 masculinity and femininity shape the manner in which power and strength are expressed  
18 during war.<sup>40</sup> In situations where women are characterized as submissive, weak and in  
19 need of protection, and men as assertive, strong and responsible for providing protection,

---

20 <sup>37</sup> J. S. Goldstein, *War and Gender: How Gender shapes the War System and vice versa* (Cambridge  
21 University Press, 2001) p. 265; Sivakumaran, *supra* note 18, p. 1274.

22 <sup>38</sup> A. DelZotto and A. Jones, ‘Male-on-Male Sexual Violence in Wartime: Human Rights’ Last Taboo?’  
23 (Annual Convention of the International Studies Association, New Orleans, March 2002); M. Eriksson,  
24 *Defining Rape: Emerging Obligations for States under International Law?* (Martinus Nijhoff Publishers,  
25 Leiden, 2011) p. 287.

26 <sup>39</sup> V. K. Vojdik, ‘Sexual violence against men and women in war: a masculinities approach’ 14(3) *Nevada*  
27 *Law Journal* (2014) p. 926; N. B. Maier, ‘The Crime of Rape under the Rome Statute of the ICC with a  
28 special emphasis on the jurisprudence of the Ad Hoc Criminal Tribunals’, 3(2) *Amsterdam Law Forum*  
29 (2011) p. 150.

30 <sup>40</sup> Olujic, *supra* note 22, p. 33.

1 expectations about femininity and masculinity can easily be targeted during war in order  
2 to shatter societal structures, affecting all gender identities.<sup>41</sup>  
3

4 The historical record about the occurrence of gender-based violence remains incomplete  
5 and the intersecting and overlapping root causes and motives unaccounted for in many  
6 conflict environments. If one considers the binary and often harmful societal conceptions  
7 about masculinity and femininity that intersect with socio-cultural perceptions around  
8 sexuality, ethnicity and nationality as a framework within which CRSV occurs, the  
9 exclusion of male victims from the mainstream narrative around CRSV leads to a  
10 perpetuation of masculinist and heteronormative gender ideologies that negatively  
11 impact both male and female victims of rape.<sup>42</sup> When CRSV is used synonymously with  
12 violence against women and girls, the experiences of other groups of victims, particularly  
13 those of men and trans communities, remain unrecognized and victims without effective  
14 support services. Male-identified victims face general unavailability of support resources  
15 and all victims are expected to make meaning of, heal, and ultimately move on in the  
16 same socio-cultural environment that facilitated their experience of sexual abuse in the  
17 first place.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41

#### 42 4.1 *Sexual Violence Against Men During the Yugoslav Wars*

43 While far less discussed and investigated by international relief organizations, news  
44 outlets and academic scholarship on CRSV, sexual violence against men was a recurring  
45 pattern of the Yugoslav Wars. NGO reports, the Bassiouni report and the court material  
46 from the International Court of Justice case regarding Bosnia's application of the  
47  
48  
49  
50  
51  
52  
53  
54  
55

---

56 <sup>41</sup> Del Zotto and Jones, *supra* note 38; Vojdik, *supra* note 39, p. 948.

57 <sup>42</sup> See also Kapur and Muddell, *supra* note 36, p. 4.; E. A. Philo Gorris, 'Invisible victims? Where are male  
58 victims of conflict-related sexual violence in international law and policy?' 22(4) *European Journal of*  
59 *Women's Studies* (2015), p. 415.  
60  
61  
62  
63  
64  
65

1 Genocide Convention substantiate that men's sexuality was systematically targeted.<sup>43</sup>  
2  
3 Agnes Inderhaug, a former member of the ICTY sexual assault investigation team, came  
4  
5 to realize that sexual violence against men was not only widespread, but an integral part  
6  
7 of the war-making itself.<sup>44</sup> It was estimated that 80 percent of the approximately 5,000  
8  
9 inmates in a concentration camp in Sarajevo had been raped.<sup>45</sup> While the exact number  
10  
11 of male rape victims in the break-up of the former Yugoslavia will never be known, their  
12  
13 invisibility is a product of masculinity tropes that governed to a significant extent the  
14  
15 nature of the war making itself. In her book *The Body of War - Media, Ethnicity, and*  
16  
17 *Gender in the Break-up of Yugoslavia*, Dubravka Žarkov gives one of the most detailed  
18  
19 accounts of the construction and intersection of gender, sexuality, ethnicity and  
20  
21 nationality during the Yugoslav Wars in relation to the national and international reports  
22  
23 of mass rapes as part of the conflict. According to her, the invisibility of male rape  
24  
25 victims during and after the armed conflict is immediately linked to the role of gender  
26  
27 and sexuality in their creation of ethnic differences during the Yugoslav War. Before the  
28  
29 war, cultural practices and norms, particularly norms relating to gender and sexuality,  
30  
31 were shared across ethnicities. Those norms equalized masculinity with heterosexuality  
32  
33 and power.<sup>46</sup> During the war, to preserve Croat, Serb or Bosnian Muslim power and  
34  
35 nationhood, it was important for the ethnic Self to maintain its unquestioned masculinity  
36  
37  
38  
39  
40  
41  
42  
43

---

44 OSCE, *supra* note 21, pp. 96 *et seq.*; Amnesty International, *Bosnia-Herzegovina: Rape and Sexual Assault by Armed Forces*, 21 January 1993, EUR 63/001/1993, <https://www.amnesty.org/en/documents/eur63/001/1993/en/>, accessed 19 April 2019, p. 5; United Nations Security Council, *Final Report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780*, 27 May 1994, UN Doc. S/1994/674, [www.icty.org/x/file/About/OTP/un\\_commission\\_of\\_experts\\_report1994\\_en.pdf](http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf), accessed 19 April 2018, para. 235. *Bosnia Herzegovina v Yugoslavia (Serbia and Montenegro)*, 20 March 1993, International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, General List No. 91.

45 E. Carlson, 'Sexual Assault on Men in War', 349 *The Lancet* (1997), p. 129; E. Carlson, 'The hidden prevalence of male sexual assault during war: Observations on blunt trauma to male genitals' 46(1) *British Journal of Criminology* (2006) p. 16.

46 Kapur and Muddell, *supra* note 36, p. 8.

47 D. Žarkov, *The Body of War – Media, Ethnicity, and Gender in the Break-up of Yugoslavia* (Duke University Press, Durham, 2007) pp. 156, 169f.

1 while that of the ethnically Other had to be challenged. Reports of sexual violence against  
2 male members of the ethnic Self would have hampered this image; reports of sexually  
3 abused male members of the ethnic Other, however, supported a portrayal of the Other  
4 as less pristine and powerful.<sup>47</sup> The link between ethnicity, gender, sexuality, and power  
5 was, according to Žarkov, not only a dominant feature in the local reporting of sexual  
6 violence against men, but also reflected in the perpetration of sexual violence. She  
7 suggests that prison guards assaulted ethnically different prisoners with foreign objects  
8 in public, but did not rape them in public as this would have caused there to be witnesses.  
9 Male victims of rape (here meant as the non-consensual physical perpetration of sexual  
10 organs of or by the male perpetrator) did, presumably, have less chance to survive.<sup>48</sup>  
11 Therefore, there may have been fewer witnesses to testify in front of fact-finding  
12 commissions and, ultimately, the ICTY.  
13  
14 And yet, the writing and publishing of the above-mentioned NGO reports either  
15 overlapped with the drafting and establishment of the ICTY Statute or occurred shortly  
16 afterwards. For this reason, it is not entirely clear how much knowledge the drafters of  
17 the ICTY Statute had about the extent to which males were sexually abused during the  
18 Yugoslav Wars. However, Del Zotto and Jones claim that the issue of male victimhood  
19 of sexual violence was, despite sufficient evidence, ignored in the preparatory sessions  
20 of the ICTY in which the topic of dealing with witnesses of sexual violence was  
21 discussed.<sup>49</sup> Žarkov has questioned the readiness and ability of key international figures  
22 who were involved in the establishment of the ICTY to abandon and move beyond  
23 popular conceptions of masculinity and wartime rape. To substantiate this concern,

---

24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65

<sup>47</sup> The Croatian media, for example, created a narrative in which homosexuality was a natural characteristic of Serb and Muslim men, but not of Croat men. In this narrative, Muslim men were framed as feminized victims of sexual violence while Serb men were demonized and pathologized as perpetrators of sexual violence against men. See: Žarkov, *supra* note 46, p. 169.

<sup>48</sup> Žarkov, *supra* note 46, p. 166.

<sup>49</sup> DelZotto and Jones, *supra* note 41.

1 Žarkov cited the Dutch legal experts Melanie Tijssen and Timeke Cleiren. Cleiren was a  
2 member of the U.N. Commission of Experts collecting data on rape and sexual assaults  
3 during the Yugoslav Wars and later gave expert testimony before the ICTY. Cleiren and  
4 Tijssen held that attitudes about gender only factor into cases of sexual violence against  
5 women and that all victims of sexual violence, independent of their multiple and  
6 overlapping identities, make meaning of their abuse in the same way. Further, they were  
7 of the opinion that sexual violence against men is a homosexual act if it involves the  
8 physical penetration of the male body.<sup>50</sup> In challenging Cleiren and Tijssen, Žarkov  
9 explained that a sexual act is neither heterosexual nor homosexual in nature. Instead,  
10 dominant notions of masculinity and norms of heterosexuality within a particular cultural  
11 and political context determine which sexual acts will later be described as either  
12 heterosexual or homosexual:  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

31 The acts of violence are informed by the same set of discourses and practices -  
32 produced through intersections of gender, sexuality and ethnicity - that informs  
33 the representation of these acts. [...] the cultural meanings of violence predefine  
34 the violent act as well as their representations, while political context makes some  
35 victims, while obscuring the others.<sup>51</sup>  
36  
37  
38  
39  
40  
41  
42

43 Referring to the research on identity-based power dynamics in the context of male-to-  
44 male sexual violence and the sexual torture of political prisoners (i.e. Abu Ghraib during  
45 the 2003 Iraq War), Žarkov declares that the tortured and sexually violated male body  
46 during the Yugoslav Wars was the site of multiple identity-based power relations. CRSV  
47 against men was a manifestation of a struggle over social dominance and not a  
48  
49  
50  
51  
52  
53  
54  
55  
56

---

57 <sup>50</sup> T. Cleiren, M. Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former  
58 Yugoslavia', 3 *Nemesis Essays* 111-131 (1996); Žarkov, *supra* note 46, p. 160.

59 <sup>51</sup> Žarkov, *supra* note 46, p. 160.  
60  
61  
62  
63  
64  
65

1 manifestation of subconscious homosexual desires.<sup>52</sup> Cleiren's and Tijssen's  
2 conceptualisation of gender, sexuality and sexual violence were therefore substantially  
3 flawed. Yet, at least Cleiren's views were shared with Judges of the ICTY who were not  
4 only tasked with advancing the law on sexual violence, but who also dealt with cases of  
5 sexual violence against men. The prosecution of CRSV against men at the ICTY has to  
6 be understood and analysed in this context. At least in the early stages of the ICTY,  
7 sexual violence against men during armed conflict was still widely unrecognized in  
8 academic scholarship and not on the agendas of international relief organizations. Thus,  
9 the ICTY cases that are discussed below are embedded in a time when local and  
10 international narratives around masculinity and victimhood of CRSV still dominated the  
11 discourse on gender-based violence to the exclusion of the experiences of male victims.  
12 Moreover, as Verrall stated, the ICTY 'inherited a legacy of historical silence and under-  
13 investigation in relation to sexual violence crimes'.<sup>53</sup> In light of this, it has to be  
14 highlighted that the ICTY was the first international criminal investigative body that  
15 dealt with sexual violence against men. Breaking the silence and attempting to prosecute  
16 sexual violence against women *and* men was therefore already a major step towards  
17 broadening the scope and understanding of CRSV as gender-based violence.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42

#### 4.2 *ICTY Cases on Sexual Violence Against Men*

43 For the purpose of this article, ten ICTY cases that featured sexual violence against men  
44 have been examined carefully to find out the extent to which the tribunal dealt with,  
45 recognized, and contributed to the visibility of male victims of CRSV.<sup>54</sup> The analysis of  
46  
47  
48  
49  
50  
51  
52  
53

---

54 <sup>52</sup> Žarkov, *supra* note 46, p. 164.

55 <sup>53</sup> Verrall, *supra* note 1, p. 333.

56 <sup>54</sup> The examined cases are: *Prosecutor v. Tadić*, IT-94-1 <[www.icty.org/case/tadic/4](http://www.icty.org/case/tadic/4)> accessed 19 April 2018; *Prosecutor v. Mucić et al.*, IT-96-21 <[www.icty.org/case/mucic/4](http://www.icty.org/case/mucic/4)> accessed 19 April 2018; *Prosecutor v. Todorović*, IT-95-9/1 <[www.icty.org/case/todorovic/4m](http://www.icty.org/case/todorovic/4m)> accessed 19 April 2018;  
57  
58  
59  
60  
61  
62  
63  
64  
65



1 these cases suggests that there has been a lack of consistency in charging and prosecuting  
2 sexual violence against men. In “*Prosecuting Conflict-Related Sexual Violence at the*  
3 *ICTY*”, one of the most insightful and ground-breaking books on the topic of  
4 international prosecution of CRSV, Michelle Jarvis and Kate Vigneswaran, former staff  
5 members of the ICTY Office of the Prosecutor, concede that charges have in fact not  
6 been consistent across cases. They also refer to the alleged ICTY’s bias towards  
7 prioritising cases involving sexual violence against men over cases of sexual violence  
8 against women. A similar point has been made by Campbell who criticized the tribunal  
9 for having more counts on sexual violence relating to male than to female victims.<sup>55</sup>  
10 However, it is not necessarily only a matter of tallying counts when assessing whether  
11 or not there has been a gender-imbalance in the way in which the tribunal has prosecuted  
12 CRSV. It is equally relevant to consider whether or not opportunities to charge acts of  
13 sexual violence against men as sexual offences have been used by the tribunal to increase  
14 the visibility of and advance the jurisprudence on male victimhood altogether.  
15

16 While the prosecution of sexual violence against women has been significantly advanced  
17 by the ICTY through several landmark cases, similar progress for the prosecution of  
18 CRSV against men remained absent from the tribunal’s track record. In eight out of ten  
19 analysed cases – *Stakić* and *Knezević* being the exceptions – sexual violence against men  
20 included forced acts of fellatio between male detainees.<sup>56</sup> In five of those eight cases, the  
21

---

22 *Prosecutor v. Sikirica et al.*, IT-95-8 <[www.icty.org/case/sikirica/4](http://www.icty.org/case/sikirica/4)> accessed 19 April 2018; *Prosecutor*  
23 *v. Mejakić et al.*, IT-02-65 <[www.icty.org/cases/party/734/4](http://www.icty.org/cases/party/734/4)> accessed 19 April 2018; *Prosecutor v.*  
24 *Stakić*, IT-97-24 <[www.icty.org/cases/party/782/4](http://www.icty.org/cases/party/782/4)> accessed 19 April 2018; *Prosecutor v. Simić et al.*, IT-  
25 95-9, <[www.icty.org/case/milan\\_simic/4](http://www.icty.org/case/milan_simic/4)> accessed 19 April 2018; *Prosecutor v. Česić*, IT-95-10,  
26 <[www.icty.org/case/cesic/4](http://www.icty.org/case/cesic/4)> accessed 19 April 2018; *Prosecutor v. Brđanin*, IT-99-36,  
27 <[www.icty.org/case/brdanin/4](http://www.icty.org/case/brdanin/4)> accessed 19 April 2018; *Prosecutor v. Krajišnik*, IT-00-39,  
28 <[www.icty.org/case/krajsnik/4](http://www.icty.org/case/krajsnik/4)> accessed 19 April 2018; *Prosecutor v. Martić*, IT-95-11,  
29 <[www.icty.org/case/martic/4](http://www.icty.org/case/martic/4)> accessed 19 April 2018.

30 <sup>55</sup> K. Campbell, ‘The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal  
31 Tribunal for the Former Yugoslavia’ 1(3) *International Journal of Transitional Justice* (2007) p. 23.

32 <sup>56</sup> In *Stakić* and *Knezević*, the available information only reveals that men were forced to perform sexually  
33 humiliating acts.  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

1 forced acts of fellatio were explicitly mentioned already in the indictment.<sup>57</sup> However,  
2 the charging in those cases was inconsistent and related to different offences such as  
3 torture, inhumane treatment, cruel treatment, humiliation and degradation, other  
4 inhumane acts and persecution. Only in three cases, *Todorović*, *Sikirica et al.* and *Češić*,  
5 the forced acts of fellatio were charged under article 5 (g) of the ICTY Statute as rape.  
6  
7 As the crime of rape is listed as a separate offence only under article 5 of the ICTY  
8 Statute, it was a major advancement for the prosecution of sexual violence that such  
9 offences were charged and successfully prosecuted in numerous ICTY cases as cruel  
10 treatment, torture, persecution, and genocide.<sup>58</sup> However, the scope of the crimes under  
11 which forced acts of fellatio were charged is confusing as those crimes differ from one  
12 another in the level of severity and the motive and intent of the perpetrator.  
13

14 Another frequent problem in terms of charging sexual violence against men was that the  
15 indictments did not properly separate acts of violence that target the sexuality of the  
16 victim from other acts of violence. For instance, in *Tadić* and *Čelebići*, acts of sexual  
17 violence against men were charged together with beatings and other forms of  
18 mistreatment as torture, inhumane or cruel treatment. This practice complicates the  
19 comprehension of charges and their relation to sexual violence. Commenting on the  
20 rationale behind the OTP's decision to package sexual violence under these so-called  
21 'umbrella charges', Jarvis and Vigneswaran explained that, in addition to considering the  
22 practicality of charging incidents under separate counts, the prosecution often favoured  
23

---

24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65

<sup>57</sup> *Prosecutor v. Tadić*, Indictment of 13 February 1995, IT-94-1-I, <[www.icty.org/case/tadic/4](http://www.icty.org/case/tadic/4)> accessed 19 April 2018; *Prosecutor v. Mucić et al.*, Indictment of 19 March 1996, IT-96-21, <[www.icty.org/case/mucic/4](http://www.icty.org/case/mucic/4)> accessed 19 April 2018; *Prosecutor v. Sikirica et al.* Indictment (Second Amended) of 3 January 2001, IT-95-8-PT <[www.icty.org/case/sikirica/4](http://www.icty.org/case/sikirica/4)> accessed 19 April 2018; *Prosecutor v. Todorović* Indictment (Second Amended) of 19 November 1998, IT-95-9/1, <[www.icty.org/case/todorovic/4m](http://www.icty.org/case/todorovic/4m)> accessed 19 April 2018; *Prosecutor v. Češić* Indictment (Third Amended) of 26 November 2002, IT-95-10-I <[www.icty.org/case/cesic/4](http://www.icty.org/case/cesic/4)> accessed 19 April 2018.

<sup>58</sup> M. Jarvis and K. Vigneswaran 'Challenges to Successful Outcomes in Sexual Violence Cases' in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016) p. 58.

1 umbrella charges because they allowed for sexual violence crimes to be more easily  
2 linked to senior leadership figures, especially when they were presented as part of a  
3 campaign of crimes in prison camp setting.<sup>59</sup> Conceding that while there are clear  
4 advantages to umbrella charges, Jarvis and Vigneswaran also admit that these charges  
5 contain the risk of obscuring the gendered nature of the violent campaign.<sup>60</sup> In fact, such  
6 umbrella charges and their subsequent adjudication significantly contributed to the  
7 invisibility of sexual violence against men at the ICTY. They led to a presentation of  
8 sexual violence against men as a criminal offense that is not different in terms of its intent  
9 or impact from other forms of physical mistreatment.  
10

11 Similarly, at the trial stage, evidence of sexual violence against men was summarized as  
12 ‘other acts of violence’ or ‘mistreatment of prisoners’,<sup>61</sup> thereby concealing the sexual  
13 nature of the offences. Moreover, in *Tadić* and *Brđanin* several males who had been  
14 forced to engage in sexual acts were not referred to as victims during the trial  
15 proceedings. In *Tadić*, the forced sexual acts involved three male detainees. Only one of  
16 them was referred to as a victim while the other two were referred to as ‘the other  
17 detainees involved’.<sup>62</sup> In *Brđanin* an elderly man was ordered to rape a female detainee  
18 at Omarska Camp. The Trial Chamber later found that the threat of rape constituted a  
19 sexual assault only vis-à-vis the female but not the male detainee.<sup>63</sup>  
20

21 Despite all those factors that diminished the visibility of sexual violence against men at  
22 the pre-trial or trial stage, two cases, *Česić* and *Čelebići*, stand out positively. In *Čelebići*,  
23

---

24 <sup>59</sup> Jarvis and Vigneswaran, *supra* note 56, p. 59.

25 <sup>60</sup> *Ibid.*

26 <sup>61</sup> *Prosecutor v. Tadić*, Opinion and Judgement of 7 May 1997, IT-94-1-I <[www.icty.org/case/tadic/4](http://www.icty.org/case/tadic/4)>  
27 accessed 19 April 2018, paras. 726, 730; *Prosecutor v. Martić* Trial Judgement of 12 June 2007, IT-95-  
28 11-T <[www.icty.org/case/martic/4](http://www.icty.org/case/martic/4)> accessed 19 April 2018, para. 413.

29 <sup>62</sup> *Prosecutor v. Tadić*, Sentencing Judgement of 14 July 1997, IT-94-1-T <[www.icty.org/case/tadic/4](http://www.icty.org/case/tadic/4)>  
30 accessed 19 April 2018, para. 22.

31 <sup>63</sup> *Prosecutor v. Brđanin*, Trial Judgement of 1 September 2004, IT-99-36-T  
32 <[www.icty.org/case/brdanin/4](http://www.icty.org/case/brdanin/4)> accessed 19 April 2018, para. 516.  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65

1 Esad Landžo was charged for forcing two brothers to perform fellatio on each other.  
2 After they had been forced to perform those oral sexual acts, Landžo placed a burning  
3 fuse cord around their genitals.<sup>64</sup> The placing of a burning fuse cord around the genitals  
4 of two male detainees was charged together with severe beatings of two other detainees  
5 as wilfully causing great suffering or serious injury to body or health and cruel treatment.  
6  
7 The forced acts of fellatio were charged together with other '*incidents of inhumane acts*  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
The forced acts of fellatio were charged together with other '*incidents of inhumane acts*  
committed in Čelebići camp' as inhumane and cruel treatment.<sup>65</sup> The Trial Chamber later  
pointed out the missed opportunity in the indictment to highlight the sexual nature of the  
acts of violence against the two brothers, remarking that the forced acts of fellatio could  
also have amounted to rape if the prosecution had argued so appropriately.<sup>66</sup>

#### 4.3 *Broadening of the Definition of Rape: the Česić Case*

Despite the rather bleak picture of prosecutions of CRSV against men, the Česić case made more significant advances in progressing the Tribunal's jurisprudence on CRSV against men. Ranko Česić forced two brothers at gunpoint to hit each other and to perform fellatio on each other under the watch of other guards. The final indictment charged Česić with 'rape, which includes other forms of sexual assault' for the forced oral sexual acts.<sup>67</sup> When the prosecution submitted the final indictment against Česić, the ICTY had already defined rape in *Furundžija* as

---

<sup>64</sup> *Prosecutor v. Mucić et al.*, Trial Judgement of 16 November 1998, IT-96-21-T <[www.icty.org/case/mucic/4](http://www.icty.org/case/mucic/4)> accessed 19 April 2018, paras. 1038, 1062-1066.

<sup>65</sup> *Prosecutor v. Mucić et al.*, Indictment of 19 March 1996, IT-96-21 <[www.icty.org/case/mucic/4](http://www.icty.org/case/mucic/4)> accessed 19 April 2018, para. 34.

<sup>66</sup> *Prosecutor v. Mucić et al.*, Trial Judgement of 16 November 1998, IT-96-21-T <[www.icty.org/case/mucic/4](http://www.icty.org/case/mucic/4)> accessed 19 April 2018, para. 1066.

<sup>67</sup> *Prosecutor v. Česić*, Sentencing Judgement of 11 March 2004, IT-95-10, <[www.icty.org/case/cesic/4](http://www.icty.org/case/cesic/4)> accessed 19 April 2018, para. 14; *Prosecutor v. Česić*, Indictment (Third Amended) of 26 November 2002, IT-95-10 <[www.icty.org/case/cesic/4](http://www.icty.org/case/cesic/4)> accessed 19 April 2018, para. 15.

- (i) the sexual penetration, however slight:
- a. of the vagina or the anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - b. of the mouth of the victim by the penis of the perpetrator
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>68</sup>

When Česić pleaded guilty to all counts of the final indictment, the plea agreement in the charge relating to rape set forth that proof is required that ‘... (a) the Accused caused the victim(s) to be sexually penetrated without their consent [and that] (b) the Accused intended that a sexual penetration occur; (...)’.<sup>69</sup> In point (a), the prosecution slightly - but essentially - amended the first element of the definition of rape to include causing someone else to rape. Recognizing that Česić’s lack of physical involvement in the sexual act is outside of the scope of the ICTY definition of rape in *Furundžija*, the wording of the plea agreement allowed the prosecution to circumvent this fact. In finding Česić guilty under Article 5 (g) of the ICTY Statute, the Trial Chamber established that an act of a sexual nature can constitute rape even if the perpetrator is not part of the sexual act itself. This was particularly significant in that *Česić* was the first case in ICL in which sexual violence against men had successfully been prosecuted as rape.

The forced acts of fellatio between two male detainees described in *Česić* were by far no exception but a common element of ICTY cases in which CRSV against men were part of the criminal investigation. In most of these cases, the defendants did not themselves physically assault other men, but forced male detainees to perform sexual acts on each other. The exclusion of this particular form of CRSV against men during the Yugoslav

---

<sup>68</sup> *Prosecutor v. Furundžija*, Trial Judgement of 10 December 1998, IT-95-17/1T <[www.icty.org/case/furundzija/4](http://www.icty.org/case/furundzija/4)> accessed 19 April 2018, para. 185.

<sup>69</sup> *Prosecutor v. Česić*, Plea Agreement 28 October 2003, IT-95-10/1-PT <[www.icty.org/case/cesic/4](http://www.icty.org/case/cesic/4)> accessed 19 April 2018, para. 5.

Wars from the ICTY definition of rape renders the definition *de facto* not gender neutral.

The *Česić* Plea Agreement picked up on this dilemma and amended the concept of physical penetration to the benefit of male victims of sexual violence. Unfortunately, however, it was not utilized in any other case before the ICTY.

In summary, while acknowledging the procedural and statutory difficulties of prosecuting CRSV against men and celebrating the progress made in *Česić*, the pervasive mischaracterization by judges and prosecutors of CRSV against men as another form of physical violence was the most salient challenge in increasing the visibility and broadening the understanding of gender-based violence at the ICTY.<sup>70</sup> It is also worth mentioning that in the context of different modes of liability, the ICTY seems to have adapted a highly sophisticated approach to establishing liability of commanders for CRSV, while at the same time perpetuating tropes about masculinity and CRSV as a form of predictable male behaviour during war. The ICTY established that where women were held in detention by armed, drunk, physically and mentally abusive men, sexual violence against these women was deemed foreseeable.<sup>71</sup> Given the relative invisibility of sexual violence against men, though prevalent in most conflict environments and certainly widespread during the Yugoslav Wars, a similar argument to establish the liability of a commander for the sexual abuse of men has not been made. In either case, the highly gendered language used in *Kvočka* (cited in section 3.2.) makes several assumptions about *typical* violent male behaviour during war and is a flat attribution of the commission of sexual violence crimes to all male guards under the influence of alcohol. This assumption, though strategically useful for holding commanders accountable, challenges efforts of abandoning the perception of sexual violence as a

---

<sup>70</sup> Kapur and Muddell, *supra* note 36, pp.17, 22.

<sup>71</sup> *Prosecutor v. Kvočka et al.*, Trial Judgment of 2 November 2001, IT-98-30/1 <[www.icty.org/case/kvocka/4](http://www.icty.org/case/kvocka/4)> accessed 19 April 2018, para. 327.

1 natural side-effect of war. It perpetuates a narrative in which sexual violence is caused  
2 by the natural sexual drive of male combatants that is facilitated by the overall chaos and  
3  
4 moral decline during armed conflict. Further, while constructing sexual violence in a  
5  
6 binary framework of male perpetrators versus female victims, the ‘foreseeability of  
7  
8 sexual violence’ argument made in *Kvočka* does not account for male victims of sexual  
9  
10 violence. It feeds a narrowed view and understanding of gender-based violence that does  
11  
12 not appreciate and fully account for the socio-cultural interconnectedness of CRSV  
13  
14 against women *and* men.  
15  
16  
17  
18  
19  
20  
21

## 22 **5 Intersectionality in the ICTY Judgments on CRSV**

23  
24  
25

26 Intersectionality is a concept and a framework for the critical inquiry of injustices that  
27  
28 produce societal tensions and conflict. It encourages a better understanding of how  
29  
30 groups of society are, based on their overlapping identities, more vulnerable to  
31  
32 experiencing marginalization and violence. Thus far, no criminal court or tribunal has  
33  
34 demonstrated an intersectional approach in prosecuting cases involving CRSV. Holding  
35  
36 the ICTY to such a standard would be dismissive in light of the tremendous challenges  
37  
38 the tribunal encountered in pioneering prosecutions of CRSV, and the novelty of  
39  
40 intersectionality as a concept at the time. However, given the legacy of ICTY in relation  
41  
42 to changing perceptions of CRSV (not least in the ICL field), our article seeks to examine  
43  
44 the extent to which the ICTY has addressed and challenged harmful societal dynamics  
45  
46 and considered identity-based differences in experiencing harm, therefore making a step  
47  
48 towards advancing a more intersectional analysis of CRSV.  
49  
50  
51  
52  
53  
54  
55  
56  
57

### 58 **5.1 Addressing Societal Relations in Context of CRSV**

59  
60  
61  
62  
63  
64  
65

Referring to the work of Nayanika Mookherjee, Dubravka Žarkov wrote that

a woman's experience of rape cannot be abstracted from her experience of the world in which she learns what it means to be raped. (...) Agency and victimization do not only stand side by side, but actually constitute each other.<sup>72</sup>

As we argued in section 2.1, a man's experience of rape is equally a product of societal and communal values and norms relating to gender, harm, and violence. Especially in non-international conflicts, the experience of both victim and perpetrator are framed by the same social and cultural knowledge. The stigma attached to a person surviving rape is therefore known to (and likely intended by) the perpetrator. Žarkov established that the representation and interpretation of sexual violence by various national communities through different media outlets were instruments for enacting identity and mobilising ethnicity during the Yugoslav Wars. In this dynamic, these enacted and mobilised ethnicities turned into an interpretive frame within which sexual violence was understood and the conflict justified.<sup>73</sup> In this light it becomes clear that identity-based power dynamics on the intersection of gender and ethnicity were major socio-cultural forces that created a climate within which sexual violence became a powerful tool for waging war.

The relation between socio-cultural dynamics and the extent to and ways in which gender-based violence occurs during armed conflict were in no way unique to the Yugoslav Wars. Feminists who have advocated for the prosecution of wartime rape throughout the past thirty years have emphasised the importance of situating wartime

---

<sup>72</sup> Žarkov, *supra* note 46, p. 179.

<sup>73</sup> Buss, *supra* note 6, p. 420.



1 rape within the broader socio-political context of structural inequality that contributed to  
2 violence and existed before the outbreak of war. Accordingly, in ‘peacetime’ and in  
3  
4 ‘wartime’ violence and inequality are the result of complex identity dynamics and gender  
5  
6 relations within society. Gender and ethnicity can thereby not be treated as entirely  
7  
8 separate identity categories. Therefore, interpreting CRSV uniformly as either ethnicised  
9  
10 violence or gender-based violence does not reflect the complex realities of many conflict  
11  
12 environments, including the Former Yugoslavia. Thus, prosecutions of international  
13  
14 crimes committed during armed conflict, particularly CRSV, is a highly legalistic  
15  
16 response to a large scale violence in which socio-cultural dynamics and endemic  
17  
18 inequality remain invisible and therefore unrepaired.<sup>74</sup> For Turan, the exclusion of  
19  
20 diverse social realities from the investigations in international criminal justice constitutes  
21  
22 a danger of narrating a single truth that suppresses alternative and subordinate voices. As  
23  
24 a consequence, this single ontology of past and present gives rise to a future that is built  
25  
26 upon the same socio-cultural dynamics that turned out to be the foundation for the  
27  
28 outbreak of large-scale violence in the first place.<sup>75</sup> At the ICTY and in other  
29  
30 international criminal courts, there appears to be limited appetite for judicial engagement  
31  
32 with root causes of CRSV. The Trial Chamber in *Čelebići* considered it futile to elaborate  
33  
34 on root causes of violations, noting that the Chamber

35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  

‘does not seek to identify causal factors, nor through history explain why the  
conflict with which we are concerned occurred. It would indeed do no justice to  
the victims of this conflict to attempt to explain their suffering by proffering  
historical ‘root causes’ which somehow inexorably led to the violence which  
engulfed them’.<sup>76</sup>

---

<sup>74</sup> *Ibid.*, p. 413.

<sup>75</sup> Turan, *supra* note 3, p. 35.

<sup>76</sup> *Prosecutor v. Mucić et al.*, Trial Judgement of 16 November 1998, IT-96-21-T  
<[www.icty.org/case/mucic/4](http://www.icty.org/case/mucic/4)> accessed 19 April 2018, para.89.

1 From the perspective of advancing jurisprudence on CRSV in ICL, it is concerning that  
2 the ICTY has dismissed the need to ‘look beyond’ the crimes of CRSV. The Tribunal  
3 has thereby foregone an opportunity to reflect on the gendered nature of sexual violence  
4 and its socio-cultural impact. The continuum of such violence between ‘peacetime’ and  
5 ‘wartime’ has therefore remained unaddressed.  
6  
7  
8  
9  
10

11 Despite the court’s reluctance to engage with root causes of CRSV, the socio-cultural  
12 dimension of CRSV was at times made visible after all, particularly in witness statements  
13 which occasionally were also directly quoted in the judgments. For instance, testimony  
14 of Mrs Čećez, one of the CRSV victims in Čelebići, highlighted the severe and personal  
15 impact of rape (“he trampled on my pride and I will never be able to be the woman that  
16 I was”) whilst also indicating the long-term and strategic nature of CRSV  
17 (“Psychologically and physically I was completely worn out. They kill you  
18 psychologically.”).<sup>77</sup> Whilst stigma and shame of rape victims received some visibility  
19 in cases involving sexual violence against women, their gravity generally did not affect  
20 the sentencing of the convicted perpetrators. In the context of CRSV against men, the  
21 tribunal has not commented specifically on the stigma or shame attached to male victims  
22 of sexual violence. Only in Češić the Trial Chamber highlighted that the forced acts of  
23 fellatio were a particularly serious violation of the moral and physical integrity of the  
24 two brothers, which was considered in determining a sentence.<sup>78</sup> However, the Trial  
25 Chamber did not elaborate further on this point. It is therefore not clear whether the  
26 particularly severe violation of the brothers’ integrity relates to the stigma and shame  
27 attached to their experience, to the fact that they are both men, to the fact that they are  
28 siblings, or to a combination of all these circumstances. In either case, the judgments  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57

---

58 <sup>77</sup> *Ibid.*, para.938.

59 <sup>78</sup> *Prosecutor v. Češić*, Sentencing Judgement of 11 March 2004, IT-95-10/1 <[www.icty.org/case/cesic/4](http://www.icty.org/case/cesic/4)>  
60 accessed 19 April 2018, paras. 35, 53.  
61  
62  
63  
64  
65

1 concerning CRSV have never condemned the societal and structural forces that shame  
2 and stigmatize survivors of such crimes. Thus, while acts of CRSV have been prosecuted  
3 and punished at the ICTY, little attention has been given to advancing the understanding  
4 of root causes of gender-based violence. In doing so, the ICTY has left a gap for the ICC  
5 and other international criminal investigative bodies that aim to be as impactful as the  
6 ICTY has been in many other aspects of ICL.  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

## 17 5.2 *CRSV as a Gendered Harm*

18 During and after the Yugoslav Wars, uncountable reports have been produced about the  
19 mass rapes of primarily Bosnian Muslim women. At the time of the establishment of the  
20 tribunal, feminists advocated for rape not to be solely understood as an attack on an entire  
21 ethnic community (as “the dishonouring of the nation”<sup>79</sup>), but also as a crime committed  
22 against a woman as a *woman*.<sup>80</sup> However, most media news stories that addressed their  
23 experiences framed these women into the discourse of Muslim traditions of male  
24 protection of women. They reduced Muslim women to blind followers of the cultural  
25 norms of chastity, passivity, and submissiveness that made their rape even more tragic  
26 because now they were left with a life of stigma, shame, and abandonment.<sup>81</sup> Also in the  
27 ICTY’s case-law, one can observe examples of such approaches. For instance, the Trial  
28 Chamber in *Krstić* heavily focused on emphasizing the patriarchal nature of Bosnian  
29 Muslim society and established a direct link between this characteristic and the impact  
30 of killings of men in Srebrenica on surviving Bosnian-Muslim women. The Trial  
31 Chamber asserted that ‘the elimination of virtually all the men has made it almost  
32 impossible for Bosnian Muslim women who survived the take-over of Srebrenica to  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57

---

58 <sup>79</sup> Buss, *Performing Legal Order*, *supra* note 6, p. 413.

59 <sup>80</sup> *Ibid.*, p. 418.

60 <sup>81</sup> Žarkov, *supra* note 46, p. 144.  
61  
62  
63  
64  
65

1 successfully re-establish their lives'. Furthermore, the Trial Chamber emphasised 'the  
2 catastrophic impact that the disappearance of two or three generations of men would have  
3 on the survival of traditionally patriarchal society'.<sup>82</sup> Such an approach, whilst  
4 emphasizing women as secondary victims of the Srebrenica genocide, created a uniform  
5 picture of Bosnian Muslim society, in which women were portrayed not only as a  
6 homogenous group, but also as individuals lacking agency whose identity is defined  
7 through men and by ethnic and religious characteristics.  
8

9  
10 Another critique of the ICTY's jurisprudence on CRSV, especially rape, relates to the  
11 manner in which the judgments portrayed such crimes as primarily ethnicity-related  
12 rather than conceptualising them also as acts of gender-based violence against women.  
13  
14 By focusing predominantly on ethnicity as a factor for vulnerability, the ICTY failed to  
15 acknowledge the overlapping identity categories that made different groups of society  
16 more vulnerable to becoming targets of CRSV. Furthermore, cases such as *Krstić* that  
17 focused solely on the collective harm experienced by a group of people based on their  
18 ethnic belonging left out the recognition of women's individual experiences of violence  
19 and conflict from the Tribunal's judgments. Also, in cases involving sexual violence  
20 against men, the ICTY did in most cases refer to the ethnicity of the victim, but it did not  
21 refer to the acts of sexual violence as a form of gender-based violence that target the male  
22 victim's sexuality and role as a man within society. In contrast, while exclusively  
23 focusing on ethnicity in many cases involving Bosnian Muslim victims, the ICTY did  
24 not engage the category of ethnicity when considering the multiple rapes of Mrs Čećez,  
25 a Bosnian Serb woman, in *Čelebići*. This was despite the fact that the judgment  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57

---

58 <sup>82</sup> *Prosecutor v. Krstić*, Trial Judgment of 2 August 2001, IT-98-33-T <[www.icty.org/case/krstic/4](http://www.icty.org/case/krstic/4)>  
59 accessed 19 April 2018, paras. 91, 595.  
60  
61  
62  
63  
64  
65

acknowledges that crimes prosecuted in that case were driven by ‘feelings of revenge against people of Serb ethnicity’.<sup>83</sup>

Whilst trying to emphasize the gender-specific impact of the Srebrenica genocide in *Krstić*, the Trial Chamber missed an opportunity to further conceptualise gendered harms and deepen the analysis of the impact as well as root causes of such harms suffered by (not only Bosnian Muslim) women during the conflict in the Former Yugoslavia. Questioning the way in which the Tribunal arrived at such conclusion, Buss also notes that ‘courts are also sources of official knowledge about what happened to women and men during that conflict, and hence what harms need to be addressed as part of the ‘transition’ from conflict to ‘peace’’.<sup>84</sup> As such, the approach of the ICTY (as well as other courts) also informs other transitional justice processes. It is therefore crucial that such records adequately and fully reflect the spectrum, impact, and causes of gendered harms.

The demand for a more complex analysis of the root causes of CRSV and a more nuanced portrayal of CRSV in international criminal judgments puts feminist jurisprudence, as Ní Aoláin and Turan indicate, into a position where it has to decide what its focus shall be. Should greater focus be placed upon the individual lived experiences of the victim, or the actuality of the criminal practices, unencumbered by social context, which could potentially result in a far too generalized understanding of harm?<sup>85</sup> The ICTY has opted not to side with either one of these strategies, leaving it up to future international criminal investigations to strike a balance between the creation of a narrative that enables the

---

<sup>83</sup> *Prosecutor v. Mucić et al.*, Trial Judgement of 16 November 1998, IT-96-21-T <[www.icty.org/case/mucic/4](http://www.icty.org/case/mucic/4)> accessed 19 April 2018, para.1269.

<sup>84</sup> Buss, *supra* note 7, pp. 74-75.

<sup>85</sup> Turan, *supra* note 3, p. 33. F. N. Aoláin, ‘Sex-based violence and the Holocaust: A re-evaluation of harms and rights in international law’ 12(1) *Yale Journal of Law & Feminism* (2000) p. 61.

prosecution of violent campaigns, and the recording of nuances in which harm was perpetrated and experienced differently by a seemingly homogeneous but factually diverse group of people.

## 6 Conclusions

A lot has changed in ICL since the ICTY came into being in 1993, both in the field of international criminal law as well as in general international law and international policy-making. Whilst much remains to be done in the field of accountability for CRSV, the debates have shifted from whether to prosecute CRSV to ‘how’ best to achieve justice for its victims.<sup>86</sup> The courts and tribunals which came into being after the ICTY (e.g. Extraordinary Chambers in the Courts of Cambodia, Special Court for Sierra Leone, the ICC) all contained substantive provisions on CRSV and prosecuted CRSV crimes. At an international level, we have observed the increased commitment to prosecuting and combatting CRSV which resulted in substantive as well as institutional developments. These include (but are not limited to): the appointment of the Special Representative of the Secretary-General on Sexual Violence in Conflict (2008), adoption of the UNSCR 1325 (2000) and Women, Peace and Security Agenda at the UN Security Council, the launch of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict; the Global Summit to End Sexual Violence in Conflict (London, 10-13 June 2014).<sup>87</sup>

---

<sup>86</sup> M. Milanović, ‘The impact of the ICTY on the former Yugoslavia: an anticipatory postmortem’ 110(2) *American Journal of International Law* (2016) pp. 233-259.

<sup>87</sup> Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict was established by UNSCR 1888 (2009); United Nations Security Council, *Resolution 1325* (UN Doc. S/RES/1325); UK Foreign & Commonwealth Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, 11 June 2014, <[www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict](http://www.gov.uk/government/publications/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict)> accessed 19 April 2018.

1  
2 Although there exists a degree of scepticism regarding the Tribunal's work, the ICTY  
3  
4 has achieved an impressive landmark in advancing prosecutions of CRSV. Both on a  
5  
6 substantive and procedural level, the ICTY set a solid jurisprudential foundation for  
7  
8 international as well as domestic criminal justice institutions – not least the International  
9  
10 Criminal Court - that can (and should) seek justice for the victims of CRSV. However,  
11  
12 as we demonstrated in this article, the ICTY's jurisprudence also produced certain  
13  
14 silences, especially with regard to the manner in which CRSV is interpreted and  
15  
16 portrayed in the judgments. We suggest that a turn towards a more intersectional analysis  
17  
18 of CRSV in the judgments of the ICTY could have further advanced the understanding  
19  
20 of CRSV and gone an extra mile in subverting myths concerning such acts. That said,  
21  
22 the true legacy of the ICTY's jurisprudence, especially its critical elements, lies in its  
23  
24 future contributions to prosecutions of CRSV. It is now the task of the remaining  
25  
26 international and domestic criminal courts to not only learn lessons from the ICTY but  
27  
28 also build upon them to continue delivering justice for the victims of CRSV.  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65